No. 79-703

In the Supreme Court of the United States

OCTOBER TERM, 1979

BERNARD CAREY, as State's Attorney of Cook County, Illinois,

Appellant,

vs.

ROY BROWN, FINLEY CAMPBELL, VICKI CAMPBELL, STEVE CARL, JOAN RAISNER, IRMA SAUCEDO, KAREN SHOLL WEINER, DAVID SMITH, LAWANDA SMITH, MARK SMITH, JULIANE SOUCHEK, BRANDA STADEL CARL, MARSHA VIHON, HOWARD WEINER, RICHARD WEST, and the COMMITTEE AGAINST RACISM, an unincorporated association, on their own behalf and on behalf of a class similarly situated,

Appellees.

Appeal from the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR APPELLEES

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TOPICAL INDEX

TABLE OF AUTHORITIES

United States Supreme Court Cases:

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QUESTIONS PRESENTED

I. Whether a state law which prohibits picketing at the residence or dwelling of any person, including peaceful political picketing at the residences of elected public officials, violates the Equal Protection Clause and the First Amendment by excepting labor picketing from that prohibition.

II. Whether a state may totally ban peaceful picketers seeking to convey appropriate political messages from the public streets and sidewalks in residential areas when there are less restrictive means of protecting the right to quiet enjoyment of the home.

III. Whether the Illinois Residential Picketing Statute is vague and overbroad.

STATEMENT OF THE CASE

The facts of this case are not in dispute. They are adequately set forth in the Brief for Appellant and the opinions of the courts below. It is undisputed that Appellees picketed in a peaceful manner, that they were on the public sidewalk in front of the residence of an elected public official, and that their message—promoting the busing of school children to achieve racial integration in Chicago's public schools—was squarely within the realm of protected speech. There is no evidence that their picketing disturbed anyone, that the public official was aware of their presence, or that Appellees in any way blocked traffic. Appellant concedes that Appellees want to picket on public property in front of the residences of local political officials in the future to protest those officials' policies on public issues, Brief for Appellant at 9, and that Appellees will again be arrested and prosecuted under the Illinois Residential Picketing Statute if they do so. Brief for Appellant at 4-5.

SUMMARY OF ARGUMENT

Appellees' past and proposed conduct—peaceful picketing on the public streets and sidewalks to protest the political actions of an elected public official—is "an exercise of [the] basic constitutional rights [of speech, assembly and petition] in their most pristine and classic form." *Edwards* v. *South Carolina,* 372 U.S. 229, 235 (1963); *accord, Thornhill* v. *Alabama,* 310 U.S. 88 (1940). The public streets and sidewalks have traditionally been regarded proper fora in

which to exercise this form of First Amendment activity, *Hague* v. *CIO,* 307 U.S. 496, 515 (1939); *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 152 (1968), regardless of whether the streets and sidewalks are located in residential areas. *See Gregory* v. *City of Chicago,* 394 U.S. 111 (1969); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971).

Legislation suppressing First Amendment freedoms is subject to strict scrutiny and can be sustained only if a state can demonstrate a subordinating interest which is compelling, *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 786 (1978), because "in our system, undifferentiated fear or apprehension is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines School District,* 393 U.S. 503, 508 (1969); *Police Dep't of Chicago* v. *Mosley,* 408 U.S. 92, 101 (1972). Legislation that infringes the right to use public streets for First Amendment expression must be aimed at specific evils and narrowly drawn. *Lovell* v. *Griffin,* 303 U.S. 444 (1938); *Cantwell* v. *Connecticut,* 310 U.S. 296, 304 (1940). Such legislation must be struck down if less restrictive alternatives are available, *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960); *Lamont* v. *Postmaster General,* 381 U.S. 301, 310 (1965) (Brennan, J., concurring); *United States* v. *O'Brien.* 391 U.S. 367, 377 (1968), and there is a heavy presumption against the validity of prior restraints. *Organization for a Better Austin* v. *Keefe, supra,* 402 U.S. at 419 (1971).

Nevertheless, Illinois has adopted legislation making most picketing on the streets and sidewalks in residential areas a criminal offense.[1] The Illinois Residential Picketing Statute, *Ill. Rev. Stat.* ch. 38, §21.1-2 (1977), provides:

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[1] There is no official history of the legislation. For an unofficial account of the bill's passage see Heinz, Gettleman and Seeskin, *Legislative Politics and the Criminal Law,* 69 Nw.U.L.Rev. 277, 293-296 (1969).

> Prohibition-Exceptions. It is unlawful to picket before or about the residence or dwelling of any person, except when the residence or dwelling is used as a place of business. However, this Article does not apply to a person peacefully picketing his own residence or dwelling and does not prohibit the peaceful picketing of a place of employment involved in a labor dispute or the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest. Added by act approved June 29, 1967, L. 1967, p. 940.[2]

This legislation is unconstitutional for three reasons. First, by making an exception for labor picketing the statute violates the Equal Protection Clause of the Fourteenth Amendment and the First Amendment's prohibition against governmental regulation of the content of speech. *See Police Dep't of Chicago* v. *Mosley,* 408 U.S. 92 (1972). Second, the statute violates the First and Fourteenth Amendments by banning residential picketing where a narrowly drafted statute regulating the time, place and manner of residential picketing would adequately safeguard the state's interest. *See Shuttlesworth* v. *Birmingham, supra.* Third, the statute is vague and overbroad. *See Hynes* v. *Mayor of Oradell,* 425 U.S. 610 (1976); *Coates* v. *Cincinnati,* 402 U.S. 611 (1971); *Connally* v. *General Construction Company,* 269 U.S. 385 (1926).

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[2] A violation of Section 21.1-2 is a Class B misdemeanor. *Ill. Rev. Stat.* ch 38, §21.1-3 (1977). A Class B misdemeanor is punishable by imprisonment for not more than six months, *Ill. Rev. Stat., supra,* ch. 38, §1005-8-3(a)(2), and/or a fine not to exceed $500. *Ill. Rev. Stat., supra,* ch. 38, §1005-9-1(a)(3). Other than this case below, there are no reported cases involving section 21.1-2.

ARGUMENT

I.

THE ILLINOIS RESIDENTIAL PICKETING STATUTE IS VOID UNDER POLICE DEP'T OF CHICAGO v. MOSLEY.

The Court of Appeals for the Seventh Circuit held that the Illinois Residential Picketing Statute, as applied to Appellees and on its face, violates the Equal Protection Clause of the Fourteenth Amendment as construed in *Police Dep't of Chicago* v. *Mosley,* 408 U.S. 92 (1972). *Brown* v. *Scott,* 602 F.2d 791, 795 (1979); *See also People Acting Through Community Effort* v. *Doorley,* 468 F.2d 1143, 1146 (1st Cir. 1972) (holding a similar statute invalid for the same reason). That judgment must be affirmed because, as the court of appeals held, no principled distinction can be drawn between this case and *Mosley.*

In *Mosley* the Court held invalid a Chicago ordinance which prohibited picketing or demonstrating "on a public way within 150 feet of any . . . school building while the school is in session . . . provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute. . . ." 408 U.S. at 92-93. Mosley was convicted under the ordinance for peacefully picketing a Chicago high school to protest the schools allegedly discriminatory admissions policies. The effect of the ordinance, the Court observed, was to permit peaceful picketing on the subject matter of a school's labor policies but to prohibit peaceful picketing on any other subject matter. 408 U.S. at 95. Since the latter form of picketing was not shown to be any more disruptive than the former, the regulation slipped from "the neutrality of time, place and

circumstance'' to a restriction based on subject matter. 408 U.S. at 99. The Court held:

> The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives. . . . Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject. . . . Such [disruption] ''can be controlled by narowly drawn statutes,'' *Saia* v. *New York,* 334 U.S. at 562, focusing on the abuses and dealing evenhandedly with picketing regardless of subject matter. Chicago's ordinance imposes a selective restriction on expressive conduct far ''greater than is essential to the furtherance of [a substantial governmental] interest.'' *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968). Far from being tailored to a substantial governmental interest, the discrimination among pickets is based on the content of their expression. Therefore, under the Equal Protection Clause, it may not stand. 408 U.S. at 101-102.

The principle of *Mosley* has consistently been reaffirmed by this Court. *E.g., First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 785 (1978); *Hudgens* v. *NLRB,* 424 U.S. 507, 520 (1976); *City of Madison Joint School Dist. No. 8* v. *Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 175-176 (1976).

Mosley is ''on all fours'' with this case. The Illinois statute prohibits picketing before or about the residence or dwelling of any person—but it excepts from that prohibition picketing a residence which is also a place of employment involved in a labor dispute.[3] Appellant concedes

[3] The statue also makes exception for picketing a residence used as a place of business, one's own residence, and a residence which is ''the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest.'' Holding the labor distinction not severable from the remainder of the statute,

(footnote continued)

that this exception applies to residences which are not also places of business, see Brief for Appellant at 7, and that the exception applies only to labor picketing. *Brown* v. *Scott, supra,* 602 F.2d at 792 n.1. Thus, a residence may be picketed to protest the resident's labor policies but not to protest his policies on civil rights. Substitute ''school'' for ''residence'' and this case is identical to *Mosley.*

A. THE STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE THERE IS NO COMPELLING STATE INTEREST WHICH JUSTIFIES THE STATUTE'S EXCEPTION FOR LABOR PICKETING.

In spite of *Mosley,* the state attempts to justify its discriminatory scheme on the ground that the interest the statute seeks to protect—quiet enjoyment of the home—is different from the interest the ordinance protected—quiet classrooms. This distinction is wholly immaterial insofar as equal protection is concerned: the issue here is not whether the right to quiet enjoyment of the home is a compelling reason for prohibiting *all* residential picketing,[4] but simply whether it is a compelling reason for allowing residential picketing about labor issues and prohibiting

(footnote continued)

the court of appeals did not consider the constitutionality of the other exceptions. *Brown* v. *Scott,* 602 F.2d 791, 795 n.6. Because the court of appeals limited its opinion to the constitutionality of the labor exception, Appellees will so direct their discussion in this section; however, the arguments against the labor exception also apply to the other exceptions in the statute.

[4] *Cf. Grayned* v. *City of Rockford,* 408 U.S. 101 (1972) (all disruptive noises can be prohibited at a school); *Adderley* v. *Florida,* 385 U.S. 39 (1966) (all picketing can be prohibited at a jail).

residential picketing about all other issues.[5] Clearly, it is not.

Nevertheless, the state argues that by bringing a domestic employee into his home the resident converts it from a "residence" into a "place of employment" and thereby waives his right to quiet enjoyment of the home as far as labor picketing is concerned.[6] This is a distinction without any principled basis in reality. By analogy, a school which employs teachers, rather than using volunteers, could be labeled a "place of employment" rather than a "school" in order to justify an exception favoring labor picketing alone. Purely nominal distinctions such as these can be made to justify almost any form of discrimination.

Since the regulation of expressive conduct is involved, however, the statute's preference for labor picketing must be carefully scrutinized to see if there is a compelling state interest to justify the discriminatory treatment. *See Police Dep't of Chicago* v. *Mosley, supra,* 408 U.S. at 98-99; *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 217 (1974). Illinois' selective exclusion of all but labor picketing cannot survive even the "rational basis" test.[7] A few common sense examples show that, even if employing a domestic could be regarded as constituting conversion to a "non-residential" use, there is no reason—certainly no compelling reason—for allowing picketing about that use and prohibiting picketing about other equally "non-residential" uses.

For instance, if employing a domestic is a "non-residential" use of one's home there is no rational or compelling reason why displaying a political candidate's poster in the window of one's home is not also a "non-residential" use. But Illinois does not permit a picketer to carry an opposing candidate's campaign poster on the public sidewalk in front of that home. Similarly, there is no rational or compelling reason why keeping pets in one's home does not constitute a "non-residential" use. But the Anti-Cruelty Society is prohibited from picketing the homeowner if he mistreats his pets.

Under the Illinois scheme, a janitors' union can picket a residence to persuade the owner to hire a janitor,[8] a

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[5] Amicus Curiae New England Legal Foundation suggests that a basis for the labor/non-labor discrimination is a First Amendment right of the domestic employee to picket where he works about labor issues. Brief of Amicus Curiae New England Legal Foundation at 10. The simple answer to that contention is that the Illinois statute does not give a forum to the employee alone. *See* n. 8, *infra.*

[6] Appellant frames the issue, "Whether the Equal Protection Clause is violated by a state law which prohibits all picketing of dwellings used solely for private residential purposes, but permits limited picketing of homes used for non-residential public purposes?" Jurisdictional Statement for Appellant at 4. This formulation does not fairly present the question because it assumes what must be demonstrated, *viz,* that a private residence which makes use of domestic help is ipso facto being used for "non-residential public purposes". The very term *domestic* belies the argument. The issue properly framed is "Whether the Equal Protection Clause is violated by a state law which prohibits all picketing of dwellings used solely for private residential purposes—except labor picketing?"

[7] The statute's exception for labor picketing is clearly not a simple time, place and manner regulation which brings about only an "incidental" abridgment of speech. Even if it were, however, "weighty" reasons would be required to justify the regulation. *See Konigsberg* v. *State Bar,* 366 U.S. 36, 69 (1961) (Black, J., dissenting).

[8] See Chicago Sun Times, May 12, 1978, at 96, App. at 21a-22a. It should be noted that the Illinois statute does not simply provide a forum for employees to picket; the union can picket even if the homeowner and the janitor do not want it. *See AF of L* v. *Swing,* 312 U.S. 321 (1941). Moreover, the union could presumably picket the homeowner even if the place of business of the janitor's employer were elsewhere. Cf. *Point East Condominum Owners Association, Inc.,* 193 NLRB 6 (1971).

teamsters' union can picket a residence to protest the non-union status of the occupant's chauffeur, and both unions can picket about which has jurisdiction. But a local neighborhood preservation group cannot peacefully picket a residence which is also a landmark to protest its proposed alteration, and a civil rights group cannot peacefully picket the residence of a person who is engaged in "blockbusting" in that neighborhood. However, as long as the picketing is peaceful, there is no reason for allowing labor picketing and prohibiting non-labor picketing,[9] *Police Dep't of Chicago* v. *Mosley, supra,* 408 U.S. at 100, and to do so is "an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment. 408 U.S. at 98; *Cox* v. *Louisiana,* 379 U.S. 536, 581 (1965); *See also Niemotko* v. *Maryland,* 340 U.S. 268 (1951); *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953); *Brown* v. *Louisiana,* 383 U.S. 131, 151 (1966) (White, J., concurring).

B. THE STATUTE VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS BECAUSE IT DISCRIMINATES SOLELY ON THE BASIS OF CONTENT.

Just as the statute violates the Equal Protection Clause by discriminating among pickets without a compelling reason, so it violates the First Amendment and the Equal Protection Clause by selecting those who may picket solely on the basis of the content of the messages conveyed. The words of Mr. Justice Black's concurring opinion in *Cox* v. *Louisiana, supra,* 379 U.S. at 581, quoted in *Mosley, supra,* 408 U.S. at 97-98, are equally applicable here:

[9] Interestingly, the Illinois legislature found that *"all* residential picketing, *however just the cause inspiring it,* [is disruptive of the right to quiet enjoyment of the home]." *Ill. Rev. Stat.* ch. 38, §21.1-1 (1977) (emphasis supplied).

> "[B]y specifically permitting picketing for the publication of labor union views [but prohibiting other sorts of picketing], [the state] is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on the streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments."

The government simply may not select what matters of public interest may be discussed in public. *Police Dep't of Chicago* v. *Mosley, supra,* 408 U.S. at 96;[10] *Hudgens* v. *NLRB,* 424 U.S. 507, 520 (1975). This is "censorship in a most odious form."

Young v. *American Mini Theatres, Inc.,* 427 U.S. 50 (1976) (opinion of Stevens, J.), relied on by Appellant, does not in any way weaken *Mosley's* applicability to this case. In *Young,* a restrictive zoning plan which applied only to theatres exhibiting "adult" films was held constitutional on the ground that the ordinance preserved the character of urban neighborhoods. An analogy between *Young* and this case might be drawn if the Illinois statute prohibited all residential picketing which, for example, involved carry-

[10] The passage from *Mosley* at 96 cited by Appellant at pp. 10 and 11 of his brief does not give support to "a content-related scheme of selective exclusions of picketers." It merely says that discrimination among picketers will be carefully scrutinized *even* where such selection is compelled by conflicting demands on the same place. Clearly this refers to traffic-type regulations that attempt "no regulation at all of the content of speech and which [are] neither openly nor surrepititiously aimed at speech . . . ." *Konigsberg* v. *State Bar,* 366 U.S. 36, 69 (Black, J., dissenting). *See generally* Kalven, *Cox* v. *Louisiana: The Concept of the Public Forum,* 1965 Sup.Ct. Rev. 1, 29, quoted in *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 67 n. 27 (1976) (opinion of Stevens, J.).

ing erotic or sexually provocative signs or signs bearing scatological language. *See also FCC* v. *Pacifica Foundation,* 438 U.S. 726 (1977); *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970). *But see Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1974); *Cohen* v. *California,* 403 U.S. 15 (1971). No proper analogy can be drawn here, however. The ordinance in *Young* would certainly not have been upheld if it had barred the showing of all films except those which concerned labor disputes. In this regard, *Young* reaffirmed *Mosley*:

> If picketing in the vicinity of a school is to be allowed to express the point of view of labor, that means of expression must be allowed for other points of view as well.[11] 427 U.S. at 64.

Thus, if labor picketing is allowed in the vicinity of residences Appellees also must be allowed to express their point of view by picketing there.[12]

[11] It makes no difference if the infringement on free discussion of public issues is framed in terms of "speakers," "subject matter," "issues" or "viewpoint". The ultimate evils are the same: certain issues are not discussed and the expression of certain viewpoints is foreclosed. *See First Nat'l Bank of Boston* v. *Bellotti,* 435 U.S. 765, 784-786 (1977); *City of Madison Joint School Dist. No. 8* v. *Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 175-176 (1976); *see generally* Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject Matter Restrictions,* 46 U.Chi.L.Rev. 81 (1978).

[12] Of course, there would be no merit to the argument, and Appellant does not advance it, that the labor exception is permissible because public streets fronting on private residential property become "private" for First Amendment purposes. *Cf. Evans* v. *Newton,* 382 U.S. 296 (1966). Moreover, even under such an analysis the state could not permit picketing related to the use of property and prohibit picketing not related to its use. *See Hudgens* v. *NLRB,* 424 U.S. 507, 518 (1976). Assuming *arguendo* the First

(footnote continued)

C. APPELLEES HAVE STANDING TO RAISE THE EQUAL PROTECTION AND REGULATION OF CONTENT ARGUMENTS.

In the instant case, Appellees are prohibited from picketing elected public officials at their homes about the officials' positions on political issues of local, neighborhood significance. A union, on the other hand, would be allowed to picket the homes of the same officials if the officials used non-union crews to make campaign film shorts in their living rooms. The court of appeals held, *Brown* v. *Scott, supra,* 602 F.2d at 794, and Appellant does not dispute in this Court, that Appellees have standing to raise the issue that labor picketers are granted a public forum denied to them.

The district court thought Appellees had no standing to argue the labor exception because the then mayor's residence was not shown to be a place of employment. *Brown* v. *Scott,* 462 F.Supp. 518, 534-535 (N.D. Ill. 1978). As the court of appeals held, that distinction is incorrect because the statute regulates residences, not places of employment. 602 F.2d at 793. Limiting picketing to a residence that is not a place of business but which is involved in a labor dispute is the same as allowing only labor picketing at purely private residences.

(footnote continued)

and Fourteenth Amendments did permit a state to prohibit picketing not related to a residence's use, an exception for labor picketing alone, and not for all other "related-use" picketing would not be permissible. *Cf. Lloyd Corp.* v. *Tanner,* 407 U.S. 551, 564 (1972) (where the subject matter of the handbilling was in no way related to the shopping center). In any event, the picketing here relates both to the public officials whose residences are sought to be picketed and to the residential areas themselves, since busing is a neighborhood issue.

In any event, the question of standing should not turn on the irrelevancy of whether Mayor Bilandic employed a gardener or chauffeur. As Appellant admits, Appellees wish to picket residences of various public officials about political issues that affect neighborhoods and they will be arrested and prosecuted under the statute if they do so. Moreover, the court of appeals ruled that this case should be certified as a class action, and Appellant has not appealed that ruling. Some of the residences Appellees and their class desire to picket are undoubtedly places of employment.

Certainly there exists a case or controversy between the parties which assures that the issues will be thoroughly examined. *See Baker* v. *Carr,* 369 U.S. 186, 204 (1962). And since the statute controls the content of speech, special regard for the First Amendment would give Appellees standing to raise the statute's facial invalidity even if it did not apply to them. *See Schaumburg* v. *Citizens for a Better Environment,* 48 U.S.L.W. 4162, 4165 (February 20, 1980).

II.

THE STATUTE VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS BECAUSE IT PROHIBITS ALL RESIDENTIAL PICKETING WHERE A NARROWLY TAILORED STATUTE REGULATING RESIDENTIAL PICKETING IS ALL THAT CAN BE JUSTIFIED.

In addition to violating the Equal Protection Clause by giving a preference to labor picketing, and the First Amendment by impermissibly regulating the content of speech, the Illinois Residential Picketing Statute is unconstitutional for another reason: it totally bans picketing on the public streets and sidewalks where a total ban is not the least restrictive alternative. The statute does not regulate picketing in terms of "time, place, and circumstance", *Police Dep't of Chicago* v. *Mosley,* 408 U.S. 92, 99 (1972); rather, it totally prohibits residential picketing except in the enumerated instances, where no restrictions are imposed. As the Maryland Court of Appeals said in holding a similar residential picketing statute unconstitutional, *Maryland* v. *Schuller,* 280 Md. 305, 372 A.2d 1076, 1081 (1977):

> The statute proscribes picketing even if it is peaceful and orderly, is quiet and non-threatening, is on public property, and does not obstruct persons and traffic. The ban applies regardless of the time of day the picketing takes place. While picketing and parading and the use of the streets for such purposes is subject to reasonable time, manner and place regulation, such activity may not be wholly denied. *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969).

Such activity may not be wholly denied because picketing is a form of First Amendment expression, *Thornhill* v. *Alabama,* 310 U.S. 88 (1940), and the public streets and sidewalks are traditional public fora for First Amendment expression, *Hague* v. *CIO,* 307 U.S. 496 (1939), including the public streets and sidewalks in residential neighborhoods. *Gregory* v. *City of Chicago,* 394 U.S. 111 (1969); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971). Legislation regulating the right to use public streets must be narrowly drawn, *Lovell* v. *Griffin,* 303 U.S. 444 (1938); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940), and the right to use the streets for communication of views "must not, in the guise of regulation, be abridged or denied." *Hague* v. *CIO, supra,* 307 U.S. at 515-516. The Court has repeatedly stressed:

> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed

> in the light of less drastic means for achieving the same basic purpose. *Shelton* v. *Tucker* . . . ." *Buckley* v. *Valeo,* 424 U.S. 1, 238-239 (1975) (opinion of Burger, C.J.).

Appellant argues, nevertheless, that Illinois' interest in safeguarding the right to quiet enjoyment of the home justifies the state in prohibiting generally all picketing on the public streets and sidewalks in front of residences, even peaceful political picketing before the residences of elected public officials. The rationale upon which this argument is based is that the right of residents to be undisturbed by even "the classic expressive gesture of the solitary picket", *Grayned* v. *City of Rockford,* 408 U.S. 104, 119 (1972), outweighs the picketer's right to use the public streets and sidewalks in residential areas.

Nothing in the record, however, indicates that residential picketing results in any substantive evil that government has the right to prevent. And "in our system, undifferentiated fear or apprehension is not enough to overcome the right to freedom of expression." *Tinker* v. *Des Moines School District,* 393 U.S. 503, 508 (1969); *Police Dep't of Chicago* v. *Mosley, supra,* 408 U.S. at 101. Indeed, the rationale upon which the total ban of other residential picketing is based is fatally impeached by the exception granted labor picketing.[13]

To be sure, the presence of an unwanted message outside one's residence might, at times, be slightly annoying.

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[13] *See generally* Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana,* 1965 Sup.Ct.Rev. 1, 29 ("If some groups are exempted from a prohibition on parades and pickets, the rationale for prohibition is fatally impeached.") quoted in *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 67 n. 27 (opinion of Stewart, J.).

Speech, however, is protected even when it is annoying. *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1948). The unwanted message can rather easily be ignored. *See Spence* v. *Washington,* 418 U.S. 405, 412 (1974); *Cohen* v. *California,* 403 U.S. 15, 21 (1971); *see generally* Haiman, *Speech* v. *Privacy: Is There a Right not to be Spoken to?,* 67 Nw. U.L.Rev. 153 (1972). Deliberate, scurrilous verbal or visual assaults might be proscribed. *See Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 210 n. 6 (1974), citing *Rosenfeld* v. *New Jersey,* 408 U.S. 901, 905-906 (1972) (Powell, J., dissenting). Thus, any undue annoyance associated with picketing that is not associated with the message can be eliminated by narrowly drawn time, place and manner regulations.[14] Therefore, it is unnecessary to resort to the total ban expressed in the present legislation.

A. THE RIGHT TO BE LET ALONE IN ONE'S HOME DOES NOT INCLUDE THE RIGHT TO IMPEDE THE FREE FLOW OF INFORMATION TO ONE'S NEIGHBORS.

Appellant's justification for a total ban on most residential picketing is based on the dubious proposition that "where conflicts arise between residential privacy and other rights—even exalted First Amendment rights—resi-

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[14] Appellees have always conceded that Illinois may constitutionally impose reasonable time, place and manner regulations on the use of residential streets and sidewalks for picketing. *See Cox* v. *New Hampshire,* 312 U.S. 569 (1941); *Poulos* v. *New Hampshire,* 345 U.S. 395 (1953). Thus Illinois can narrowly regulate the number of pickets and the hours during which they may picket; it may prohibit loud and raucous picketing and the use of offensive sound amlifying devices; it may prohibit pickets from interfering with traffic on the streets and sidewalks and from trespassing on private property.

dential privacy is generally protected above all else." Brief for Appellant at 15. The Court has often said, to the contrary, that First Amendment rights, while not absolute, must generally be afforded primacy. *E.g. Saia* v. *New York*, 334 U.S. 558, 562 (1948); *see generally* McKay, *The Preference for Freedom*, 34 N.Y.U. L. Rev. 1182 (1959). There is, on the other hand, no general constitutional right of privacy. *Whalen* v. *Roe*, 429 U.S. 589, 607-608 (1977) (Stewart, J., concurring).[15]

In any event, the Court has long recognized that a governmental interest in preserving residential tranquility will not justify restricting the free flow of information into residential neighborhoods.[16] As early as *Martin* v. *Struth-*

[15] *Cf. Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), "which upheld a zoning ordinance that restricted no substantive right guaranteed by the Constitution." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 84 n. 1 (1976) (Stewart, J., dissenting).

[16] There is no precedent for the proposition that the right to quiet enjoyment of the home includes the right to have peaceful picketers kept off adjacent public sidewalks, and the cases relied on by the state are inapposite. *Kovacs* v. *Cooper*, 336 U.S. 77 (1949), and *Grayned* v. *City of Rockford*, 408 U.S. 101 (1974), deal with loud, raucous, disruptive behavior. *Cox* v. *Louisiana*, 379 U.S. 559 (1965), *NLRB* v. *Fruit Packers Local 760*, 377 U.S. 58 (1964), and *Teamsters Union* v. *Vogt, Inc.*, 354 U.S. 284 (1957), involve picketing that has an illegal object. *Breard* v. *City of Alexandria*, 341 U.S. 622 (1951), concerns trespass with prior notice. *Adderley* v. *Florida*, 385 U.S. 39 (1966), *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), and *Greer* v. *Spock*, 424 U.S. 828 (1978), involve public property not traditionally regarded public fora. *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728 (1970), *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), all deal with "borderline" speech which, in *Rowan* and *Pacifica Foundation*, was actually set into the home. *Packer Corp. v. Utah*, 285 U.S. 105 (1932), involves commercial speech, which was then unprotected.

ers, 319 U.S. 141 (1943), the Court struck down an ordinance banning all door-to-door leafleting, although such activity actually involves going onto private property and knocking on the door, because "[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society." 319 U.S. at 146-147; *cf. Saia* v. *New York*, *supra*.

More recently, in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1975), an injunction against pamphleteering in a neighborhood was overturned on the ground that it stopped the free flow of information to the public. There, leaflets relating to the respondent's real estate practices were distributed near his home—seven miles away from his office and business activities. The leaflets, some of which urged their readers to call the respondent at his home, were passed out to parishioners on their way to and from respondent's church and left at his neighbors' doors. 402 U.S. at 417. The Appellate Court of Illinois had upheld the injunction "on its belief that the public policy of Illinois strongly favored protection of the privacy of home and family from encroachment of the nature of petitioners' activities." 402 U.S. at 418. In overturning the injunction, this Court said:

> Any prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity. . . . Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record. 402 U.S. at 419-420.

In *Linmark Associates, Inc.* v. *Willingboro*, 435 U.S. 85, 95 (1977), this Court held invalid an ordinance prohibiting "for sale" and "sold" signs on front lawns, because it impeded the free flow of information, even though the ordinance's purpose was to preserve the racially integrated

character of the community. And just this term, in *Schaumburg* v. *Citizens for a Better Environment,* 48 U.S.L.W. 4162 (February 20, 1980), this Court struck down an anti-solicitation ordinance which only indirectly interfered with the free flow of information. In so doing, the Court noted that the ordinance was not directed at the unique privacy interests of persons in their homes because it applied not only to door-to-door solicitors, but also to solicitation on the public streets and ways. 48 U.S.L.W. at 4166.

Like the injunction in *Citizens for a Better Austin* and the ordinance in *Citizens for a Better Environment,* the Illinois statute proscribes expressive activity, in this case even less intrusive than door-to-door solicitation, not just on private property but also on the public way. Since the purpose of peaceful picketing is almost always to educate third parties about a dispute between picketers and the picketed,[17] *see Thornhill* v. *Alabama,* 310 U.S. 88, 99 (1940); *AF of L* v. *Swing,* 312 U.S. 321 (1941), the effect of the statute is likewise to impede the flow of information.[18]

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[17] Plaintiffs alleged in their Amended Complaint, paragraph 4, App. 7a-8a, and in affidavits in support of their motion for summary judgment, Affidavits of F. Campbell, paragraph 6, and R. Brown, paragraph 7, App. at 18a, 20a, that they want to engage in residential picketing to demonstrate in Chicago neighborhoods their concern about the neighborhood issue of busing.

[18] Since leafleters can be required to obtain prior consent before going onto private property, *Breard* v. *Alexandria,* 341 U.S. 622 (1951), a total ban on residential picketing could effectively keep groups such as CAR from disseminating their ideas in residential areas. Moreover, leafleting is no alternative to picketing, which is less costly, requires fewer people to reach the same size audience and is more easily understood by the less educated. Also, picketing is less intrusive than door-to-door canvassing. *Cf. Schaumburg* v. *Citizens for a Better Environment,* 48 U.S.L.W. 4162, 4168 (February 20, 1980) (Rehnquist, J., dissenting) quoting Z. Chafee, FREE SPEECH IN THE UNITED STATES 406 (1954).

B. THERE IS NO ADEQUATE ALTERNATIVE FORUM FOR RESIDENTIAL PICKETING.

Despite the lack of a factual or legal basis for concludnig that the classic symbol of a solitary picketer interferes in any essentially intolerable way with the quiet enjoyment of the home, Appellant argues that the availability of alternative fora tips the balance in favor of a total ban on residential picketing. This argument has been rejected soundly in *Schneider* v. *New Jersey,* 308 U.S. 147, 163 (1939), where the Court said that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[19] Moreover, Appellant's argument ignores Appellees' right to address the particular audience they choose—in this case a local public official's neighbors—and the concomitant right of the neighbors to receive information.[20] Picketing, at a different location, such as city hall, is an inadequate alternative because the message would not reach the desired neighborhood audience.

Picketing at an alternative forum, such as city hall, is also inadequate because the picketing is less likely, in many cases, to attract the attention of the person whose policies are being picketed. The offices of public officials are often far above the street level. The picketers' message below

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[19] Any other rule would pave the way for Orwellian legislation confining religious activity to the churches and political picketing to arenas especially constructed for that purpose.

[20] The right to receive information is constitutionally protected. *See Lamont* v. *Postmaster General,* 381 U.S. 301, 305 (1965); *Virginia Board of Pharmacy* v. *Virginia Consumer Council,* 425 U.S. 748, 756-757 (1976). Appellees have standing to raise the First Amendment rights of their audience. *See Bates* v. *State Bar of Arizona,* 433 U.S. 350, 364 (1977).

goes unnoticed. In addition, if residential picketing gets better news media coverage than does picketing in other places, as the district court believed, 462 F.Supp. at 531, that is a further reason why alternative fora are not adequate. Furthermore, in many cases, even some involving public figures, alternative fora simply do not exist. For example, the only effective place to picket about the activities of the leader of a "mothers-against-busing" campaign may well be at her residence. Expressive activity is not removed from the protection of the First Amendment simply because it is intended to be effective. *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971).

III.

THE ILLINOIS RESIDENTIAL PICKETING STATUTE IS VAGUE AND OVERBROAD.

"[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). Such a statute is void-for-vagueness. *Smith* v. *Goguen,* 415 U.S. 566, 572 (1974). It violates due process because it does not inform what is commanded or forbidden, *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453 (1939), and because it allows arbitrary and discriminatory law enforcement. *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969). The vague statute is overbroad if it can be construed as making criminal, conduct which cannot be constitutionally penalized. *Coates* v. *Cincinnati,* 402 U.S. 611, 614 (1971). Here, Appellant admitted that the statute "may be susceptible to possible overbroad applications." *Brown* v. *Scott, supra,* 462 F.Supp. at 534 n. 17.

Where a statute is capable of reaching speech, an even greater degree of specificity is demanded than in other

contexts. *Smith* v. *Goguen, supra,* 415 U.S. at 573; *Hynes* v. *Mayor of Oradell,* 425 U.S. 610, 620 (1976). Such is the regard for First Amendment freedoms that even a person whose own speech is unprotected has standing to challenge the constitutionality of a statute which seeks to prohibit protected speech. *Schaumburg* v. *Citizens for a Better Environment,* 48 U.S.L.W. 4162, 4165 (February 20, 1980); *see also* the eighteen cases cited in *Young* v. *American Mini Theatres, Inc.,* 427 U.S. 50, 59 n. 17 (1976). In this case it is clear that the deterrent effect on legitimate expression, including its deterrent effect on Appellees, is both "real and substantial", and that, given its many vague terms, the statute is not "readily subject to a narrowing construction" by the Illinois courts.[21]

The statute is vague, first, because "[t]he vague contours of the term 'picket' are nowhere delineated."[22]

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[21] Although this statute has been on the books almost thirteen years, there are no reported cases under it. If, as was the case with Appellees, the state routinely offers defendants charged under the statute "deals they can't refuse", it is unlikely the state's courts will ever have an opportunity narrowly to construe the statute. *Compare Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 216-217 (1974) *with Broadrick* v. *Oklahoma,* 413 U.S. 601, 615 (1973). Also, Appellees are not "hard-core" violators attempting to overturn criminal convictions by appealing to the hypothetical rights of third persons. Here, Appellees conduct was protected, they are not challenging their convictions, and they themselves are in danger of arbitrary and discriminatory enforcement. *Compare Parker* v. *Levy,* 417 U.S. 733 (1975) and *Young* v. *American Mini Theatre, Inc.,* 427 U.S. 50, 59 (1976) *with Wooley* v. *Maynard,* 430 U.S. 705, 712 (1977).

[22] *Compare* the Illinois Residential Picketing Statute *with* the public issue picketing statute held unconstitutional in *Medrano* v. *Allee,* 347 F. Supp. 605, 622-625 (S. D. Tex. 1972), *aff'd,* 416 U.S. 802 (1974).

Thornhill v. *Alabama,* 310 U.S. 88, 100-101 (1939). Would the president of CAR be in violation of the statute if he stood in front of the home of the mayor of Chicago without signs or leaflets of any sort, in silent protest of the mayor's failure to take a stand in favor of busing? Would it make any difference if he talked to people who came by? If he handed out leaflets? If he wore an armband to signify his protest or a T-shirt with "Busing, Yes" emblazoned on it? If he carried a placard? A sign on a stick? If he walked up and down instead of standing still?

Second, the statute is rendered both vague and overbroad by the terms *before or about.* The statute does not make clear, in terms of distance or otherwise, how far the ambit of its prohibition extends. Does it make any difference in the example above if the CAR president is on the public sidewalk or roadway as opposed to being on the mayor's property? If he is on private property next door to the official's house, but with the consent of the owner? Does he violate the statute if he is on the sidewalk and across the street from the mayor's house? If he is in a public park across the street? Under the words of the statute, he could be arrested for picketing in any of those places, although some are indisputably public fora. *See, e.g., Hague* v. *CIO,* 307 U.S. 496 (1939).

Third, the statute is vague because it makes no attempt to define *residence* or *dwelling.* Do the terms include a dormitory? A rooming house? A hotel? By prohibiting picketing "before or about the residence or dwelling of any person," does the statute prohibit the CAR president from carrying a sign on public property in front of city hall because a hotel or condominium is located across the street?

Fourth, the statute does not adequately clarify the phrase *when the residence or dwelling is used as a place*

of business. Does this exception apply only where the person being picketed uses the residence or dwelling as a place of business? Or does it mean that if the building in which the residence or dwelling is located also houses a place of business all picketing is permitted? For instance, if a public official lived across the street from city hall in a hotel with a restaurant in the lobby, could he be picketed at the hotel? If he lived in a hotel that did not house any separate business? If the mayor of Chicago owns a condominium or leases an apartment, does she live at a "place of business", so that civil rights picketing is allowed there? Or is only landlord-tenant issue picketing allowed? If the mayor has a business in her residence or dwelling, are all types of picketing allowed? Or only picketing related to the business? For instance, if the mayor runs a private law practice from her residence, can CAR picket there about the mayor's stand on busing? Or only concerning her legal services? And is the picketing allowed at all times? Or only during business hours?

Fifth, the statute is vague because it makes no attempt to define a *place of employment involved in a labor dispute.* Presumably, if the mayor's chauffeur went on strike, her house would be "a place of employment involved in a labor dispute." But if the city's striking firemen picketed her house, would it then be "a place of employment involved in a labor dispute"?

Sixth, the statute is rendered hopelessly vague by the phrase, *the place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest.* If an official's house has ever been used as the place of holding a meeting or assembly, may it be picketed from then on if subjects of general public interest are

commonly discussed on the premises? Or may the picket take place only while a meeting or assembly is in progress on the premises? What does "commonly used" mean? Does it make any difference if assemblies or meetings are regularly held on the premises as opposed to infrequently? What is the difference between a "meeting" and an "assembly"? Are private meetings included? How many people make up a "meeting or assembly"? What are "subjects of general public interest"? If the mayor regularly meets with a small group of political advisors at her home, may CAR then picket there about busing? Or must the picketing relate to the issues discussed at the meeting?

These hypotheticals are not far-fetched, borderline cases. They are typical unanswerable questions that might be asked of attorneys advising CAR and other groups about picketing various residences or dwellings in Illinois, including those of public officials. It does not tax the imagination to conceive that the language of the statute would be stretched to its limit if the picketers' message, or the picketers, were out of favor with the local police. This is the very arbitrariness due process seeks to avoid.

Certainly due process is offended where a statute is so vague that reasonable lawyers examining it cannot advise a client, to a reasonable degree of certainty, what conduct the statute prohibits. In this case the district court said (Transcript of July 26, 1978 at 17):

> We've got six lawyers here this afternoon, and I'm not sure any of us would be able to advise the client with any certainty as to just what conduct does violate this statute.

The statute is clearly void-for-vagueness.

CONCLUSION

Appellees have no quarrel with the proposition that "the homes of men . . . can be protected from noisy, marching, tramping, threatening picketers and demonstrators." *Gregory* v. *City of Chicago*, 394 U.S. 111, 125-126 (1969) (Black, J., concurring). The problem with the Illinois Residential Picketing Statute is that it prohibits not just "noisy, marching, tramping, threatening picketers" but all picketers—even the most peaceful—except labor picketers. The statue is thus both underinclusive and overinclusive. *See First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 793 (1977). In both instances it is not narrowly drawn to reach only certain specified conduct which impinges on a valid state interest. *See Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-151 (1969). As Mr. Justice Black said concurring in *Gregory* v. *City of Chicago, supra* at 124:

> Narrowly drawn statutes regulating the conduct of demonstrators and picketers are not impossible to draft. And narrowly drawn statutes regulating these activities are not impossible to pass if the people who elect their legislators want them passed. Passage of these laws, however, like the passage of all other laws, constitutes in the final analysis a choice of policies by the elected representatives of the people.

The Illinois legislature opted on the one hand for an indefensible preference for labor picketing, and on the other hand for an unjustifiable suppression of all other picketing. Because the statute is thus discriminatory, overbroad, and hopelessly vague, Appellees respectfully pray that the judgment of the Court of Appeals for the Seventh Circuit be affirmed, and that Appellees be awarded the costs of this appeal and reasonable attorneys' fees.

Respectfully submitted,

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